[redacted]

No. 510

[redacted]

Appellants,

[redacted]

Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 10

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
*Appellants,*

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLS V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,
*Appellees.*

**On Appeal from the Court of Appeals of the State of New York**

## JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Court of Appeals of the State of New York modifying the judgment of the Appellate Division, Third Department, which affirmed a judgment entered in the Supreme Court, Albany County, granting judgment for

Appellees, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 2 N.Y. 2d 464, and is printed as Appendix A to this Statement. The majority and dissenting opinions of the Appellate Division, Third Department, are reported at 2 App. Div. 2d 179. The decision of the Supreme Court, Albany County, was not reported.

## JURISDICTION

(1) This is an action for a declaratory judgment and injunctive relief, brought pursuant to Sections 255, 473, 877, *inter alia*, of the New York Civil Practice Act by five optometrists licensed to practice in the State of New York on behalf of themselves and all others similarly situated, against members of the University of the State of New York, the New York Board of Regents and the State Board of Examiners in Optometry, contesting the constitutionality and legality of a regulation designated as paragraph (g) of subdivision 1, of Section 70, Article VIII, of the Regulations of the Commissioner of Education relating to Optometry, adopted by the Board of Regents on June 15-16, 1950, regulating the use of signs and displays by optometrists. The text of this Regulation is set forth at pp. 4-5, *infra*.

(2) The judgment of the Court of Appeals was entered on March 8, 1957 (Appendix B, *infra*); and a motion for reargument and to amend the remittitur was denied on May 23, 1957 (Appendix C, *infra*). A

notice of appeal was filed with the Clerk of the Supreme Court, Albany County, on July 15, 1957.[1]

(3) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

(4) Cases believed to sustain the jurisdiction of this Court are *Lake Erie & W.R.R.* v. *Pub. Util. Comm.*, 249 U.S. 422; *Live Oak Assn.* v. *R.R. Commission*, 269 U.S. 354; *Hamilton* v. *Regents*, 293 U.S. 245; and *Atchison R. Co.* v. *Pub. Util. Comm'n.*, 346 U.S. 346.

## QUESTIONS PRESENTED

(1) Where, after more than six years of litigation in which Appellants sought a judgment declaring a regulation promulgated by a state body to be invalid; and

Where the challenged regulation was amended *after* argument in the highest court of the state; and

Where the highest court of the state sustained the validity of the *amended* regulation; and

Where Appellants have never had an opportunity to be heard with respect to the validity of the amended regulation;

Have Appellants been denied the due process of law guaranteed them by Amendment XIV of the Constitution of the United States?

(2) Does a state regulation limiting the use of certain types of signs violate Amendment XIV where

---

[1] On September 9, 1957, Justice Bookstein of the Supreme Court, Albany County, extended the time for filing the record and docketing the appeal to and including November 12, 1957 (Appendix D, *infra*).

it is directed against optometrists only and does not impose the same limitations upon persons in other professions or businesses performing essentially the same services or functions?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

*Amendment XIV of the Constitution of the United States* provides in relevant part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 7108 of the New York Education Law provides in relevant part as follows:

> "The department shall have power to revoke the license, certificate of registration or certificate of exemption of any optometrist upon proof that the holder thereof has been guilty of unprofessional conduct, or of any fraud, deceit or misrepresentation in his practice or in his advertising * * *"

Article VIII, Section 70, of the Regulations of the Commissioner of Education, relating to OPTOMETRY, adopted on June 15-16, 1950, provides in relevant part as follows:

> "Definitions
>
> 1. *Unprofessional conduct, fraud and deceit.* Unprofessional conduct, fraud, deceit or misrepresentation in the practice of optometry under sections 7108 and 7111 of the Education Law shall include but shall not be limited to the following:
>
> * * *
>
> g. Advertising by means of large display, glaring, illuminated or flickering signs or by means of

any sign containing as a part thereof the representation of the human eye or any portion of the human head or the representation of spectacles, eyeglasses, frames or mountings. A large display sign shall mean a sign containing letters exceeding six inches in height on the first or ground floor and eight inches in height on the second floor or above and exceeding one foot by three feet overall. The use by an optometrist of more than five signs shall also be deemed a large display. An illuminated sign shall mean a sign lighted or self-luminous by any means whatever, or giving the outward appearance of same."

The Amendment to the foregoing, approved on January 25, 1957, provided as follows:

"Article VIII, section 70, subdivision 1, paragraph g, of the Regulations of the Commissioner of Education, relating to OPTOMETRY, amended by adding the following sentence at the end thereof:

"Nothing herein contained shall be deemed to prevent the illumination of a sign setting forth the name of the practictioner and the word 'optometrist' provided that the illumination is not colored and such sign does not otherwise conflict with this regulation."

## STATEMENT OF FACTS

The facts of this case fall into two separate and distinct stages: those which existed under the original regulation of June 15-16, 1950, and throughout more than six years of litigation including the argument in the Court below on January 24, 1957; and those under the amended regulation, adopted on January 25, 1957, the day following the argument in the Court below.

1. Appellants are five optometrists who brought suit on behalf of themselves and all others similarly

situated; and Appellees are public officials of New York State who are concerned with the regulation of the profession of optometry. On June 15-16, 1950 a regulation was adopted by the Board of Regents, the members of which are included among the Appellees, which restricted the use of advertising displays and signs by licensed and registered optometrists, by defining their use as unprofessional conduct and thereby subjecting offending optometrists to loss of license. The regulation defined as unprofessional conduct: "Advertising by means of large display, glaring, illuminated or flickering signs or by means of any sign containing as a part thereof the representation of the human eye, or any portion of the human head, or the representation of spectacles, eye-glasses, frames, or mountings." The regulation defined the size of permissible signs and displays, the number of signs which an optometrist could use, and defined illumination. The regulation is set forth in full at pp. 4-5, *supra*. The regulation applied solely to optometrists; it did not apply to persons in any of the other professions or businesses performing essentially the same functions or services.

On January 15, 1951, official notice was given that "rigid enforcement" of this regulation would be undertaken on April 15, 1951. (R. 16). On March 29, 1951, Appellants commenced this suit, seeking a declaration that the regulation was unconstitutional and illegal, and an injunction against its enforcement (R. 3 *et seq.*). An injunction *pendente lite* was granted on July 13, 1951 (R. 95), and affirmed on appeal on November 17, 1952. 280 App. Div. 1017. Thereupon, Appellees moved for judgment on the pleadings, but their motion was denied (R. 98); and the denial was

affirmed on appeal on November 12, 1953. 282 App. Div. 593.

Appellants attacked the regulation under both state and federal law. Their contentions under federal law were based upon the Fourteenth Amendment to the Constitution of the United States. Appellants alleged that there was no basis or authority in law or in fact for the regulation; or for regulating optometrists exclusively while leaving those persons in other professions and businesses performing essentially the same functions and services free of any such regulation. Appellants raised these contentions in Paragraph Nineteenth of their Complaint (R. 13-14). This contention was expressly decided against Appellants in the Supreme Court (R. 87), and in the Appellate Division (R. 115).

In each of the three New York State Courts, the evidence presented, the arguments made, the briefs submitted, and the facts and the issues of law considered, were all directed towards the 1950 regulation.

2. The case was argued before the Court of Appeals on January 24, 1957, on the basis of the 1950 regulation only. On the following day, apparently as a result of the argument, the Board of Regents adopted an amendment to the regulation. The amendment did not alter any of the original language, but added thereto a sentence permitting the use of the name of the optometrist, as well as the word "optometrist", if the sign otherwise complied with the regulation and if it was not illuminated in color. See p. 1a, *infra*.

On March 8, 1957, the Court of Appeals issued its decision (App. A, *infra*) and judgment (App. B, *infra*) sustaining the validity of the regulation as

amended, and ordered the judgment of the courts below modified "by declaring that paragraph g of subdivision 1 of section 70 of the Regulations of the Commissioner of Education adopted on June 15-16, 1950, *and as amended on January 25, 1957,* with respect to the use of signs by optometrists is legally reasonable and therefore valid . . ." p. 2a, *infra* (emphasis by the Court).

The Court thus considered and determined the validity of the regulation *as amended* without ever having afforded Appellants any opportunity whatever to be heard thereon. No evidence was ever taken, no briefs were ever submitted, and no argument was ever made on the amended regulation.

Appellants filed a motion for reargument and to amend the remittitur, which motion was summarily denied (App. C, *infra*). This motion made the express contention that Appellants had been deprived of the due process of law guaranteed by the Fourteenth Amendment, by the action of the Court below. Appellants urged that they had facts bearing on the substance of the amendment to the regulation which were directly pertinent to the cause and which might well have affected the decision of the Court; and on which they had a constitutional right to a hearing. In view of the extraordinary turn of events which Appellants could not ever have reasonably anticipated, this federal question was raised at the first reasonable opportunity, and is accordingly appropriate for review by this Court. *Cf. Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Saunders* v. *Shaw*, 244 U.S. 317, 320.

## THE QUESTIONS ARE SUBSTANTIAL

### I.

The action of the Court below, sustaining the validity of the amended regulation without ever having afforded Appellants any opportunity to be heard thereon, clearly contravened the Fourteenth Amendment under the directly applicable decision of this Court in *Saunders* v. *Shaw*, 244 U.S. 317.

A brief summary of the *Saunders* case is adequate to demonstrate its virtual identity with this case so far as concerns the issue of fair procedure under the Fourteenth Amendment. In that case, the plaintiff at the trial had attempted to prove certain facts, but his proffered evidence was excluded on the defendant's objection, and judgment was granted defendant. This ruling was affirmed by the State Supreme Court. Thereafter, this Court rendered a decision in another case under which the facts which plaintiff had offered to prove became controlling. The State Supreme Court granted rehearing and reversed the judgment for defendant and granted judgment for plaintiff.

On writ of error to this Court, defendant claimed that this procedure had deprived him of any opportunity to controvert the critical facts, thereby denying him his day in court in contravention of the Fourteenth Amendment. In unanimously sustaining this objection, this Court, in an opinion by Mr. Justice Holmes, recognized that the defendant had not been accorded due process of law "because the case had been decided against him without his ever having had the proper opportunity to present his evidence." 244 U.S. at 319. And to the assumption "that it was so plain on the uncontroverted facts . . . that to remand

. . . would be an empty form,—a mere concession to technicality", Mr. Justice Holmes replied: "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Saunders* v. *Shaw, supra,* 244 U.S. at 319.

In this case, Appellants have obviously not been granted protection of their constitutional rights, for they certainly have been given no chance whatever to put their evidence in on the amended regulation, and to present their contentions of law relating to the substance of the amendment. The decision below is thus in irreconcilable conflict with *Saunders* v. *Shaw, supra.*

Even if this were a fresh issue, the procedure followed below is clearly violative of the minimum requirements of due process which this Court has consistently demanded. "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposal before it issues its final command." *Morgan* v. *United States,* 304 U.S. 1, 18-19. It is beyond doubt that this requirement was not followed here; it could not be in a case in which the challenged regulation which is under judicial scrutiny is amended *after* the hearing before the Court was completed, and reargument on the altered facts is summarily denied.

Here, as in *Morgan, supra,* 304 U.S. at 19-20, the following analogy is plainly applicable and controlling: "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate

the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing." "The fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, relevancy and significance." *Chernekoff* v. *United States,* 219 F. 2d 721, 723 (C.A. 9).

There was never a hearing on the amended regulation! And the hearing on the regulation as it existed prior to amendment can hardly satisfy the due process requirement. The "right to a hearing means the right to a meaningful hearing." *Gonzales* v. *United States,* 348 U.S. 407, 415.

The bitter unfairness of denying Appellants any right to be heard on the amendment of January 25, 1957 is heightened by the lengthy history of this litigation. The original regulation was promulgated over seven years ago, in June, 1950. Appellants promptly challenged it. They obtained an injunction against its enforcement, which was sustained on appeal. Appellees sought judgment without trial, but this was denied; and this denial was affirmed on Appellees' appeal. Finally, the case was tried, and tried on the basis of the 1950 regulation. In three different courts, including the Court below, the issues revolved only about the 1950 regulation. After this protracted and thorough discussion and review, the issue was changed suddenly. By unilateral action; Appellees shifted the focus of the suit. And when Appellants simply asked

to be heard on the new regulation, their request was denied summarily!

Surely there is every reason on this record to hold that the decision below reduced Appellants' rights in the litigation to "the level of a game of blindman's buff." *Simmons* v. *United States*, 348 U.S. 397, 405. This Court should not suffer the decision below to stand unreviewed and unreversed.

## II.

By designating the use of certain signs and displays by optometrists as unprofessional conduct, the challenged regulation—both before and after amendment—in practical effect prohibits optometrists from using such signs and displays. A limitation in the use of signs and displays is of course within the competence of the State in the exercise of its police power, and in the courts below Appellants conceded that the State, if it saw fit, could prohibit the use of all signs by all persons who deal with the human eye.

But the original regulation adopted on June 15-16, 1950, and the regulation as amended on January 25, 1957, apply to optometrists alone of all whose work is with the human eye. Despite other important distinctions between the original and the amended regulation, both therefore present questions under the Equal Protection Clause of the Fourteenth Amendment, for they rest on distinctions which seem arbitrary and irrational, and classifications which, in practical effect, are discriminatory. *Cf. Skinner* v. *Oklahoma*, 316 U.S. 535; *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266; *Smith* v. *Cahoon*, 283 U.S. 553; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389.

Optometrists perform the same services as ophthalmologists and oculists when examining or refracting eyes for visual defects and are, in this respect, in economic competition with these professional groups (R. 32-48, 72-80, *passim*). Similarly, optometrists perform services identical to opticians and ophthalmic dispensers when repairing broken frames or lenses, or when filling prescriptions for eye-glasses, whether these prescriptions are their own or those of another optometrist, or of an oculist or ophthalmologist. In the performance of these functions, the optomertist is in direct economic competition with opticians and ophthalmic dispensers (*Ibid.*).

The challenged regulation takes no cognizance of these hard economic realities. The standards it imposes —however commendable—apply to optometrists alone; and those in economic competition with optometrists, performing essentially the same functions and services, are not included in its compass. An optometrist and an optician may face one another on different sides of the same street; but the regulation prevents the optometrist from displaying his name and calling in the same manner as the optician.

Requiring only a portion of the same economic or functional classification to adhere to lofty standards while other segments of the group are at liberty to follow their own commercial inclinations, is an arbitrary and discriminatory use of the regulatory power of a state. For this reason this case presents a picture completely different from *Williamson* v. *Lee Optical Co.*, 348 U.S. 483.

While the *Williamson* case indicates that a State has substantial leeway under the Equal Protection

Clause, 348 U.S. at 489, it did not hold that all constitutional standards could be disregarded in this economic field. In that case, this Court declared: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Id.* at 490. It is precisely because *all* who deal with the human eye have *not* been treated alike by the challenged regulations in this case that Appellants maintain that they have not been given the fair and reasonable treatment required by the Equal Protection Clause.

By a distinction which is plainly arbitrary and which wholly ignores business reality and economic fact, New York has singled out the optometrists for special treatment by drastic regulation. Other groups in direct economic competition with optometrists and who perform the same functions and services are not inhibited by this regulation in their use of merchandising methods. "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown." *Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U.S. 459, 462. In focusing only upon optometrists when there is no rational basis for doing so, the challenged regulation appears to have gone even beyond the broad range permitted by this Court's decisions and has denied Appellants "the equal protection of the laws" guaranteed by the Fourteenth Amendment.

## CONCLUSION

It is submitted that the decision of the New York Court of Appeals clearly contravenes the Fourteenth Amendment. By sustaining the amended regulation which was not adopted until after the argument before it, and by denying Appellants any hearing on the amended regulation, the Court of Appeals denied Appellants due process of law. By sustaining a regulation directed against optometrists only and not affecting others in direct economic competition performing the same functions and services, the Court of Appeals denied Appellants the equal protection of the laws. We believe that the questions presented by this appeal are substantial and that they are of public importance, and if the decision below is not summarily reversed for the obvious failure to accord Appellants that fair hearing which is their constitutional due, the questions presented clearly merit the plenary consideration of this Court.

Respectfully submitted,

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# APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 367

IRVING STRAUSS, & ORS., &c., *Appellants*,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, & ORS., &c., *Respondents*.

## Opinion

FULD, J.:

We decide the case, as it must be decided (see, e.g., *Black Riv. Reg. Dist.* v. *Adirondack League Club*, 307 N.Y. 475, 486-487; *Quaker Oats Co.* v. *City of New York*, 295 N.Y. 527, 536; *Boardwalk & Seashore Corp.* v. *Murdock*, 286 N.Y. 494, 498), on the basis of the law as it exists today. On January 25, 1957, which was the day following the argument of the appeal in this court, the regulation here involved was amended to add this sentence:

> "Nothing herein contained shall be deemed to prevent the illumination of a sign setting forth the name of the practitioner and the word 'optometrist' provided that the illumination is not colored and such sign does not otherwise conflict with this regulation."

Whether or not the regulation in its original form proscribed all "illuminated" signs, we need not consider, for it is plain beyond any doubt that, by the amendment quoted above, it allows the use of an illuminated sign setting forth the name of the practitioner and the designation "optometrist," provided the illumination is not colored. The prohibitions contained in the regulation relating to the number and size of signs that may be used are reasonable and valid and, of course, are the other proscriptions aimed at

glaring and flickering signs, as well as other signs that are illuminated.

The judgment should be modified by declaring that paragraph g of subdivision 1 of section 70 of the Regulations of the Commissioner of Education, adopted on June 15-16, 1950, *and as amended on January 25, 1957*, with respect to the use of signs by optometrists is legally reasonable and therefore valid and, as so modified, affirmed, without costs.

* * *

Judgment modified in accordance with the opinion herein and, as so modified, affirmed. Opinion by Fuld, J. All concur.

## APPENDIX B

### Judgment

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

*Witness,*

THE HON. ALBERT CONWAY,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur March 8, 1957.

---

No. 367.

IRVING STRAUSS, & ORS., &C., *Appellants,*

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, & ORS., &C., *Respondents.*

BE IT REMEMBERED, That on the 13th day of December in the year of our Lord one thousand nine hundred and fifty-six, Irving Strauss, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Frank E. Behrman, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The University of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Charles A. Brind, Jr., their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frank E. Behrman, of counsel for the appellants, and by Mr. Charles A. Brind, Jr., of counsel for the respondents, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified in accordance with the opinion herein and, as so modified, affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Cout, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be modified &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c

Raymond J. Cannon
*Clerk of the Court of Appeals*
*of the State of New York.*

Court of Appeals, Clerk's Office,
Albany, March 8, 1957.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
*Clerk.*

(seal)

## APPENDIX C

### Order Denying Motion for Reargument and to Amend Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-third day of May, A.D. 1957.

PRESENT, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 239

IRVING STRAUSS, & ORS., &C., *Appellants*,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, & ORS., &C., *Respondents.*

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

A copy

(SEAL)

GEARON KIMBALL
*Deputy Clerk*

## APPENDIX D

### Order Extending Time for Filing Record and Docketing Appeal

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse thereof, Albany, New York, on the 9th day of September, 1957.

PRESENT: HON. ISADORE BOOKSTEIN, *Justice.*

[Caption Omitted]

On reading and filing the affidavit of Frank E. Behrman, verified the 6th day of September, 1957, and upon all the proceedings and applications had heretofore, duly presented to the Justice of this Court, praying for an order and setting forth the facts necessary for an extension of time within which to file and docket an appeal herein to the Supreme Court of the United States, up to and including the 12th day of November, 1957,

And due deliberation having been given to the said request and prayer for such extension as heretofore mentioned,

Now, on motion of Frank E. Behrman, attorney for the petitioners, it is

ORDERED, that the time within which the record on appeal may be filed and the appeal docketed to, in the court herein, be and the same hereby is extended to and including November 12, 1957.

ISADORE BOOKSTEIN
*J.S.C.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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No. 610

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IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
*Appellants,*

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLS V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,
*Appellees.*

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**On Appeal from the Court of Appeals of the State of New York**

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## OPPOSITION TO MOTION TO DISMISS

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Appellees have filed a Motion to Dismiss, but have refrained from uniting therewith a motion to affirm. This election evidently flows from a recognition that if this Court has jurisdiction, it must surely reverse the decision below.

Appellees have not even deigned to cite, let alone distinguish, *Saunders* v. *Shaw*, 244 U.S. 317, a decision of this Court with which the decision below is in direct and irreconcilable conflict. Appellees do not—for they cannot—deny that the judgment below deprived Appellants of their day in Court guaranteed by the Fourteenth Amendment as construed in *Saunders* v. *Shaw*, *supra*. Instead, Appellees have filed three technical peripheral objections to the Court's jurisdiction, none of which has any merit.

1. The first two of the technical objections raised by Appellees have been denominated as: "The Judgment rests on an adequate non-Federal basis" and the appeal fails to "present a substantial Federal question." While these headings are adapted from the grounds set forth in the Rules, they have little relationship to the actual discussion in Appellees' Motion. Moreover, the content of Appellees' discussion is internally inconsistent.

Plainly, the argument that the judgment rests on an adequate state ground cannot be made simultaneously with the argument that the federal question presented is insubstantial. Since Appellees concede that there *is* a federal question—whatever may be Appellees' opinion as to its substantiality—the federal question must necessarily be decided in disposing of the case, and it cannot therefore be claimed that the decision below rests on an adequate non-Federal basis.

The existence of a federal question is made plain by Appellees themselves. At page 13 of their Motion, they state:

> "In affirming the intermediate Court, which, in turn, affirmed the Official Referee below, the

> Court of Appeals in effect stated that the purported Federal question was no longer open to argument, having been settled by the United States Supreme Court * * *."[1]

The very fact that Appellees argue that the question is governed by decisions of this Court [citing *Williamson* v. *Lee Optical Company*, 348 U.S. 483, and *Semler* v. *Oregon Board of Dental Examiners*, 294 U.S. 608] dealing with the validity of state regulation under the Federal Constitution, is plain recognition that the basis of the decision below is necessarily federal.

In fact, there are two federal questions presented by this appeal: one relating to the discriminatory nature of a regulation directed only against optometrists of all those whose work is with the human eye; and the other relating to the arbitrary denial to Appellants of any opportunity to be heard respecting the amended regulation.

Appellees, in their Motion, have addressed themselves only to the first of these questions.[2] While hardly clear, their position appears to be that the point was either abandoned or waived by Appellants sometime while this case was before the Court below. There is nothing in the record to support this startling

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[1] Likewise, at page 10 of their Motion, Appellees reluctantly admit:

> "... we suppose, technically, the decision of the Court of Appeals confirmed the findings of the Appellate Division (although no reference is made to this constitutional problem in the Court of Appeals decision) when it confirmed the order as made by the Appellate Division."

[2] The second of the questions is discussed by Appellants, *infra*, at pp. 5-6.

contention. There is not one record reference in the paragraphs on pages 6 to 8 of Appellees' Motion where this point is made; and no such reference is possible. Appellees' assertions consist entirely of conclusionary and unsupported statements *dehors* the record. These assertions are purely unilateral and self-serving; they have been subjected to no trial or test of relevance or truth. This Court should not give any consideration to such statements and should not countenance any procedure by which the facts of record are disregarded or unilaterally amended.

2. As their third technical objection, Appellees contend that the notice of appeal did not comply with Rule 10 (Motion to Dismiss, page 14). In making this contention, Appellees fail to mention that the portions of the record to be certified were *designated by written stipulation* of the parties. Moreover, Appellees do not claim that there is a dispute with regard to the contents of the certified record, for there is none; and they could hardly raise such a dispute at this late date in view of their stipulation.[3] Similarly Appellees failed to mention that they received actual prompt notice of the questions presented, and in fact argued them, on July 23, 1957, in their Opposition to the Application for Stay. The record is clear, therefore, that Appellees received the notices as to the record and the questions presented which Rule 10 was designed to afford; and Appellees, in their Motion, have made no claim to the contrary.

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[3] Rule 12.3, Revised Rules of this Court, permits the parties by stipulation to correct or change the original notice, by providing that when there is a difference between the designation in a stipulation and the designation in a notice of appeal, "the designation in the stipulation shall prevail."

Appellees have not alleged that any technical defects have in any way disadvantaged them. There is no reason on this record to hold that Appellees have presented any justification for dismissal of the appeal.

3. Appellees have offered no reply to Appellants' principal contention on this appeal that "The action of the Court below, sustaining the validity of the amended regulation without ever having afforded Appellants any opportunity to be heard thereon, clearly contravened the Fourteenth Amendment under the directly applicable decision of this Court in *Saunders* v. *Shaw*, 244 U.S. 317." (Jurisdictional Statement, p. 9).

No purpose would be served by repeating here the discussion of this issue set forth in the Jurisdictional Statement (pp. 9-12) on this issue. It is noteworthy, however, that even the unsupported and improper assertions of Appellees clearly recognize as plain and undisputable that the procedure below was highly irregular and that Appellants have never had their day in court. Appellants had been given no opportunity to present evidence as to the validity of the amended regulation, or as to both procedure and substance, under State as well as Federal law.

The principle established by this Court continues to be that "when the act complained of is the act of the [State] supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." *Saunders* v. *Shaw*, *supra*, at 320. These words, and that decision, of this Court

are precisely in point. Appellees' Motion is nowhere more eloquent or persuasive than in its utter failure to mention *Saunders* v. *Shaw*.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully submitted that Appellees' Motion to Dismiss should be denied, and that this Court should reverse on the serious and obvious violation of the Fourteenth Amendment by the Court below, upon the authority of *Saunders* v. *Shaw*, 244 U.S. 317.[4]

Respectfully submitted,

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[4] If for any reason this Court should conclude that proceeding by appeal was inappropriate, it may nevertheless, by treating the papers on appeal as a petition for certiorari pursuant to 28 U.S.C. § 2103, take the action appropriate to this case.

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IN THE

# Supreme Court of the United States

**October Term, 1957**

**No. 610**

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,

*Appellants,*

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLES V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## MOTION TO DISMISS APPEAL

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*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## MOTION TO DISMISS APPEAL

The appellees, the University of the State of New York, the Board of Regents of the University of the State of New York, and the State Board of Examiners in Optometry, do hereby move to dismiss the appeal herein.

The grounds for appellees' motion to dismiss the appeal are as follows:

I. The appeal does not present a substantial Federal question.

II. The judgment rests on an adequate non-Federal basis.

III. Such appeal was not taken in conformity with the Rules of this Court, viz., Rule 10. The notice of appeal herein did not comply with this rule in that it did not state the portions of the record to be certified by the clerk of the lower court or the precise questions presented by the appeal.

## Pertinent Statutes and Regulations

The provisions of the Education Law of this State under which the Regulation, which is the subject of this action, was adopted are as follows:

"§207. Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state; determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. * * * Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations."

"§ 211. Conformably to law the regents may supervise the entrance regulations to and the licensing under and *the practicing of* * * * *optometry* * * * and any other profession which may hereafter come under the supervision of the board of regents * * *" (Emphasis supplied).

"§ 7108. The department shall have power to revoke the license * * * of any optometrist upon proof that the holder thereof has been guilty of unprofessional conduct, or of any fraud, deceit or misrepresentation in his practice or in his advertising * * *."

"§ 7111. No person shall falsely personate a licensed optometrist of a like or different name, nor buy, sell, or fraudulently obtain a license or certificate of exemption issued to another, or *advertise* the practice of optometry *in violation of rules to be made by the department* * * *" (Emphasis supplied).

The regulation which appellants challenge provides as follows:

"§ 70. Definitions. 1. Unprofessional conduct, fraud and deceit. Unprofessional conduct, fraud, deceit or misrepresentation in the practice of optometry under sections 1432 and 1433 of the Education Law shall include but shall not be limited to the following:

* * *

"g. Advertising by means of large display, glaring, illuminated or flickering signs or by means of any sign containing as a part thereof the representation of the human eye or any portion of the human head or the representation of spectacles, eyeglasses, frames or mountings. A large display sign shall mean a sign containing letters exceeding six inches in height on the first or ground floor and eight inches in height on the second floor or above and exceeding one foot by three feet over-all. The use by an optometrist of more than five signs shall also be deemed a large display. An illuminated sign shall mean a sign lighted or self-luminous by any means whatever, or giving the outward appearance of same."

This provision was amended by the Board of Regents on January 25, 1957, by the addition of the following language:

"Nothing herein contained shall be deemed to prevent the illumination of a sign setting forth the name

of the practitioner and the word 'optometrist' provided that the illumination is not colored and such sign does not otherwise conflict with this regulation."

## Statement of Facts

This is an action for a declaratory judgment and an injunction brought by five licensed optometrists against the University of the State of New York, the Board of Regents and the State Board of Examiners in Optometry. The declaration sought was to invalidate subparagraph (g) of Section 70 of the Regulations of the Commissioner of Education, as approved by the Board of Regents on June 16, 1950. The provision restricts the use of "large display, glaring, illuminated or flickering signs * * *," etc., by optometrists (R-32).

The appellees, at Special Term, asked for an order dismissing the complaint for failure to state a cause of action. The motion was denied and the injunction granted at Special Term (Taylor, J.), (R-283 *et seq.*) and the appeal sustained by the Appellate Division (280 App. Div. 1017). Thereafter appellees made a motion for judgment on the pleadings and that motion was denied at Special Term (Bookstein, J., R-292 *et seq.*). The order was affirmed by the Appellate Division (282 App. Div. 593). Thereafter a trial was had as directed by the Court. The Official Referee (Heffernan, J.) found the regulation to be reasonable and the contention of appellants that the regulation violates their rights under Article Fourteenth of the United States Constitution to have been decided adversely to appellants by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma, Inc., et al.*, and *Lee Optical*

[1] Unless otherwise stated, figures in parentheses refer to folios of record on appeal to Court of Appeals.

*of Oklahoma, Inc.* v. *Williamson*, 348 U. S. 483, and 854, 349 U. S. 925 (R-250-270). This determination was upheld by the Appellate Division (2 A. D. 2d, 179, R-328-378). Mr. Justice Bergan stated in the opinion that the difference in treatment between different professions on which appellants rely as a basis for the jurisdiction of the United States Supreme Court "is not 'discrimination' in any constitutional or legal sense." He stated further "The main burden of plaintiffs' quarrel with the regulation is that the prohibition against all illuminated signs goes too far." Mr. Justice Halpern, concurring in part and dissenting in part, felt that the regulation should not totally prohibit illuminated signs (R-378). The majority determination of the Appellate Division was unanimously affirmed by the Court of Appeals (2 N. Y. 2d, 464), and modified in part so as to take into account and declare valid the amendment to the regulation set forth hereinabove. Appellants made a motion for leave to reargue, which motion was denied by the Court of Appeals on May 23, 1957. Thereafter appellants filed a Notice of Appeal to this Court.

## ARGUMENT

### I.

### The appeal herein does not present a substantial Federal question.

In the jurisdictional statement appellants placed great emphasis upon the argument that a substantial question is presented because of the amendments of the regulation subsequent to the argument in the Court of Appeals.

In order to understand the present status of this case, it is to be noted that it has been pending for approxi-

mately six years; the first two years were wasted because respondents thought the papers were adequate upon which to make determinations of the issues and sought dismissal based upon them. The appellants insisted upon a trial. The Court finally concluded that they were technically entitled to one if they insisted upon it. When the trial was finally reached, it was heard by Mr. Justice Heffernan—a retired Justice of the Supreme Court and a former member of the Appellate Division of this State.

An examination of the trial record (R-76-88) will reveal to this Court that it consists for all practical purposes of stipulations putting into evidence the factual material already and theretofore set forth in the papers which had been before the Appellate Division twice.

On the record as we have pointed out under "Facts," Mr. Justice Heffernan found for the respondents. Appellants then sought relief i. the Appellate Division. The Appellate Division unanimously affirmed Mr. Justice Heffernan's opinion except that Mr. Justice Halpern thought that a minor part of the rule referring to advertising through illumination should be clarified. When the case got to the Court of Appeals, counsel for the appellants thereupon completely abandoned any claim of unconstitutionality arising from his earlier contention that the regulation was discriminatory because it applied to optometrists and not to ophthalmologists, oculists and opticians. He said that his clients themselves were against glaring signs, but that the illumination part of the rule was too broad. He indicated that if the rule clearly had permitted a person to illuminate his name so that it could be read at night or in dark hallways, he would have no objection to the entire rule.

Counsel to the Board of Regents then stated in open court that the rule with respect to illumination related only to the use of light for advertising purposes and that it would not be construed as prohibiting the type of illumination outlined by counsel for the appellants which would not be advertising in the accepted meaning of the term. Counsel for the appellants replied to the Court that the counsel for the Regents might be replaced some time by one who would not so construe the rule and that the rule, therefore, was bad. Thereupon counsel to the Regents informed the Court that the Regents were then presently in session and that in his opinion they would be quite willing to clarify the rule to meet appellants' counsel's objection. The counsel for the appellants then assured the Court that this was a satisfactory solution and the case was adjourned. Certainly no objection was at that stage registered by counsel for the appellants.

Counsel for both appellant and respondent immediately repaired to the outer room, sat around a table and drafted the amendment which the Regents subsequently adopted, in the formulation of which counsel for appellants participated. It was the counsel for the Regents firm understanding that the amendment met the objection made by the appellants.

So now we find ourselves in this position. Counsel for appellants had abandoned any constitutional objection he had as to "discrimination". That is the reason no reference is made to discrimination in the Court of Appeals decision.

The objection made by him to the rule was cured by the amendment in the formulation of which he participated. In any event, it cured the very objections he had stated in open Court.

Where then is there any question, in good faith, left which this Court should be asked to pass upon? The claim that his constitutional right to his day in Court to argue about the amended rule was denied to him is absurd. Absurd because it corrected the very objection he had made to the rule and the only objection he had made to the rule. How can he argue both ends to the middle? First that the rule was bad because it did not contain the clarification and when the clarification is added, which is exactly what he claimed he wanted, that he has not had his day in Court to argue about the clarification. The only basis that we can ascribe to these tactics is—like his insistence of a trial in the first place—merely for the purpose of continued delay.

The profession of optometry is anxious to rid itself of unprofessional advertising and the record so reveals.

At the 1950 Convention the following resolution was adopted:

> "WHEREAS, Resolution No. 1, which was adopted by the 53rd Annual Convention of the NYSOA, and reaffirmed by Resolution No. 1 of the 54th Annual Convention, still remains uncompleted; and
>
> "WHEREAS, steps have already been instituted toward the presentation to the Board of Regents of the State of New York and the promulgation by them of a regulation relating to the use of large displays, glaring, flickering *or illuminated* signs; now, therefore, be it
>
> "RESOLVED, That the NYSOA, in convention assembled, does hereby reiterate and affirm the provisions of Resolution No. 1, as adopted in 1948 and does further authorize the taking of any and all steps toward the ultimate promulgation of a rule by the Board of Regents in accordance with the terms of this resolution." (Emphasis supplied.)

At the June 15-16, 1950 meeting of the Board of Regents, the regulation in question was adopted (R-186).

After the Regents adopted the regulation, a group of optometrists requested that it be reconsidered and that opponents of the regulation be given an opportunity to appear before the Regents and argue the matter. Two of the appellants were members of that group. The Regents granted the request for an opportunity to be heard and the regulation was not enforced pending deliberation. At the time of the hearing it appeared that the proponents of the regulation had polled the profession as an additional check of the sentiment of the profession although the professional society had already expressed itself on the subject. At that time petitions and cards were presented from which it appeared that of the 2000 optometrists registered approximately 1200 or 68% replied to the inquiry that they were in favor of the adoption of the regulation. Of the total number of optometrists registered it was estimated that 182 were not practicing so that actually about 1823 optometrists were in practice at that time. Approximately 300 failed to reply to the inquiry and a like number replied indicating that they were opposed to the regulation (R-187-189). It is a logical conclusion that the 300 who failed to reply were not opposed to the regulation, otherwise they would have expressed their opinions. These figures make it very apparent that the profession as a whole was firmly convinced that the regulation was a true reflection of the views of the profession with respect to the unprofessional character of the conduct restrained thereby.

There was a full and complete hearing before the Regents, the parties filed briefs and thereafter in December of 1950, the Regents affirmed the adoption of the regulation (R-154-156).

## II.

**The Judgment rests on an adequate non-Federal basis.**

We do not feel that the issue raised by the appellants, that because the optometry rule does not apply to the personnel of another profession and hence "discriminates" between the two professions, is properly a problem before this Court because appellants abandoned this issue or conceded it in the Court of Appeals.

In any event, we suppose, technically, the decision of the Court of Appeals confirmed the findings of the Appellate Division (although no reference is made to this constitutional problem in the Court of Appeals decision) when it confirmed the order as made by the Appellate Division.

Professional rules of practice applying to doctors do not apply to optometrists or opticians and vice versa. Professional rules applying to doctors do not apply to pharmacists. Professional rules applying to registered nurses need not apply to practical nurses. Professional rules applying to certified public accountants need not and could not apply to ordinary accountants. Professional rules applying to engineers need not encompass architects, and so on. This is clearly the reason the New York State Courts in this case have said that such different treatment as alleged here is not discrimination in any constitutional or legal sense and hence there is no Federal question involved. Lest there be any misunderstanding concerning the use of terms here used, we note:

In New York State there are three professions having various responsibility as to the eyes—optometrists, ophthalmologists and opticians. The ophthalmologist is a physician who has voluntarily taken post-graduate courses

and post-internships as required by the Section on Ophthalmology of the American Medical Association. After having taken these courses, the physician submits himself to written and practical examinations conducted by this Section and upon passing becomes a diplomated ophthalmologist.

The oculist is also a physician, but does not necessarily have the post-graduate training.

The ophthalmologist and the oculist are principally interested and engaged in pathology and surgery of the eye. In the course of their practice, they also engage in the refraction of the eye for the purpose of correcting vision, but this is only a minor and incidental portion of their work.

The ophthalmologist or oculist only occasionally fills the prescription he writes for eyeglasses to correct vision. The patient is given the prescription and goes to an optician whose function is hereafter described.

The optometrist is licensed under Section 7101 *et seq.* of the Education Law which defines optometry as the diagnosing of an optical deficiency or deformity, visual or muscular anomaly of the eye without the use of drugs, and the prescribing and furnishing of lenses, prisms or ocular exercises or both for correction and relief.

The optometrist is engaged exclusively in the correction and improvement of vision. He is the only practitioner exclusively and specifically trained, educated, examined and licensed to deal only with vision.

Prior to 1946 the optician was not licensed. In that year, a licensing law was enacted which uses the term "ophthalmic dispenser". The two terms "ophthalmic dispenser" and "optician" are synonymous.

The optician is licensed under Section 7120 *et seq.* of the Education Law to prepare, measure, fit and adjust spectacles and eyeglasses on the written prescription of a physician or an optometrist. The optician is like the pharmacist. He may only fill prescriptions. He may not prescribe. He performs the technical work of assembling, fitting and adjusting eyeglasses.

Appellants argue that the regulation discriminates because it applies only to optometrists and not to the other named groups. This argument upon examination is untenable.

Ophthalmologists and oculists are physicians. The medical profession is self-disciplined; so far as advertising is concerned there is no need for such regulation. So far as opticians are concerned, the statutory provisions governing the profession are different. Regulations governing the practice of that profession adopted pursuant to its statute are the subject of pending litigations. However, the mere fact that the regulation applies only to optometrists is no ground for the claim of discrimination because the professions, as heretofore pointed out, are different and the optometrists perform different functions from either the ophthalmologists or opticians.

As the Court has said in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, at page 489:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141, 84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570. The legislature may select one phase of

one field and apply a remedy there, neglecting the others. *A. Feof L. v. American Sash & Door Co.*, 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 258, 260, 6 A. L. R. 2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."

Again we reiterate, the decision of the Court of Appeals itself rests on an adequate non-federal ground. The holding of the Court below is to the effect that the regulation is legally reasonable and, hence, within the power of the Commissioner of Education and the Board of Regents to enact under State Law.

In affirming the intermediate Court, which, in turn, affirmed the Official Referee below, the Court of Appeals in effect stated that the purported Federal question was no longer open to argument, having been settled by the United States Supreme Court in *Williamson* vs. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, and, hence, the only questions which were settled by the Court below were non-federal and, therefore, insufficient as a basis for the jurisdiction of the United States Supreme Court.

This Court has heretofore held that a state may properly regulate advertising of professional practitioners where such regulation is reasonably related to the public health and welfare (*Semler* vs. *Oregon Board of Dental Examiners*, 294 U. S. 608). This rule was followed in *Williamson* vs. *Lee Optical of Oklahoma, Inc.*, *supra*, with respect to practitioners treating eye conditions.

## III.

**The notice of appeal did not comply with Rule 10.**

The notice of appeal herein did not state either the portions of the record to be certified by the clerk of the lower court to this Court or the questions to be presented.

Subsequently, appellants filed a document which they designate as "questions to be presented by appeal herein supplemental to notice of appeal", in which they purport to present three questions in relation to the validity of the regulation under attack and to designate the portions of the record to be included in the certified transcript. It is apparent that even as attempted to be supplemented by this document, the notice of appeal does not comply with Rule 10.

## CONCLUSION

**For all the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.**

Respectfully submitted,

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*Appellees.*

**On Appeal from the Court of Appeals of the State of New York**

## PETITION FOR REHEARING

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 310

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,
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v.

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*Appellees.*

On Appeal from the Court of Appeals of the State of New York

## PETITION FOR REHEARING

Appellants pray that this Court grant rehearing of its decision of January 20, 1958.

### STATEMENT

Appellants are five optometrists who brought suit on behalf of themselves and all others similarly situ-

ated; and Appellees are public officials of New York State who are concerned with the regulation of the profession of optometry. On June 15-16, 1950, a regulation was adopted by the Board of Regents, which restricted the use of advertising displays and signs by licensed and registered optometrists, by defining their use as unprofessional conduct and thereby subjecting offending optometrists to loss of license. The regulation applied solely to optometrists; it did not apply to persons in any of the other professions or businesses performing essentially the same functions or services.

On January 15, 1951, official notice was given that "rigid enforcement" of this regulation would be undertaken on April 15, 1951 (R. 16). On March 29, 1951, Appellants commenced this suit seeking a declaration that under both state and federal law the regulation was unconstitutional and illegal, and an injunction against its enforcement (R. 3 *et seq.*). An injunction *pendente lite* was granted on July 13, 1951 (R. 95), and affirmed on appeal on November 17, 1952. 280 App. Div. 1017. Thereupon Appellees moved for judgment on the pleadings, but their motion was denied (R. 98); and the denial was affirmed on appeal on November 12, 1953. 282 App. Div. 593.

The case was argued before the Court of Appeals on January 24, 1957, on the basis of the 1950 regulation only. On the following day, apparently as a result of the argument, the Board of Regents adopted an amendment to the regulation.

On March 8, 1957, the Court of Appeals issued its decision and judgment sustaining the validity of the regulation *as amended*. This decision came as a complete surprise; for Appellants had never had any

opportunity whatever to be heard on the amended regulation. In each of the three New York State Courts, the evidence presented, the arguments made, the briefs submitted, and the facts and the issues of law considered, were all directed towards the 1950 regulation. But on the amended regulation, no evidence was ever taken, no briefs were ever submitted, no argument was ever made.

## GROUNDS FOR REHEARING

In their Jurisdictional Statement, Appellants presented two distinct and separate issues: first, whether the Court below denied Appellants due process of law in sustaining the validity of the amended regulation without affording Appellants any opportunity to be heard thereon; and, second, whether a regulation limited solely to optometrists was a violation of the requirements of the equal protection clause.

This Court's *per curiam* decision dismissing the appeal "for want of a substantial federal question" drew no distinction between these two issues. Certainly the decision is not appropriate to the first issue.

*Saunders* v. *Shaw*, 244 U.S. 317, is directly applicable to the situation presented by the facts of this case. In the *Saunders* case, this Court unanimously reversed a decision of a state supreme court which relied upon matters as to which the appellant in that case had never been given a hearing. This Court declared that a state court could not change the issue being adjudicated without first affording each party opportunity to be heard, and that failing to afford such an opportunity violated the requirements of the Fourteenth Amendment. The very procedure this

Court struck down in *Saunders* v. *Shaw* has apparently now been authorized here.

It was the judgment of every member of this Court in the *Saunders* case that the failure to afford a litigant a hearing on an issue changed since the trial was a clear violation of the Fourteenth Amendment. It is inconceivable that this principle, which has never since been questioned, can be disregarded, without even raising a substantial federal question. Surely, the meaning of due process of law has not changed so drastically since 1917 that what was an obvious violation of the Fourteenth Amendment then does not even present a substantial federal question today. Indeed, if it can be held that such an issue does not today present a substantial federal question, it can only be because the issue has already been definitively decided by this Court in *Saunders* v. *Shaw*—in favor of Appellants.

The objections raised to the original regulation obviously had sufficient merit to require lengthy and serious consideration by the lower New York courts. As noted, an injunction against the enforcement of the regulation was granted by the Supreme Court, and sustained by the Appellate Division. 280 App. Div. 1017. When Appellees contended that the allegations of the complaint could be determined without trial on the pleadings alone, their contention was rejected by the Supreme Court, and this too was sustained on appeal. 282 App. Div. 593. Neither the Supreme Court nor the Appellate Division was disposed to decide the issues of the case summarily; there was no suggestion that any of Appellants' contentions were not deserving of full judicial consideration and review. Even the decision on the merits—which was against Appellants—was affirmed by a divided court; the dis-

senting opinion raised a number of objections relating to the vagueness and obscurity of the original regulation. 2 App. Div. 2d 179.

In striking contrast to the orderly and careful judicial consideration given the original regulation, only the most perfunctory review was accorded the amended regulation. Appellants have not only been denied any opportunity to be heard with regard to it, but have in effect been denied even the opportunity to make allegations respecting it.

It is not clear whether the Court below believed that the amended regulation corrected the deficiencies of the original regulation, met the objections of the Appellants, or conformed to the strictures of the dissenting opinion in the Appellate Division. But whatever the motivations of the Court below, they could not compensate for the basic constitutional deficiency that Appellants have never had any opportunity to be heard on the issue decided.

Assuming *arguendo* that Appellants' challenges to the validity of the amended regulation raise only issues of state law and do not raise a substantial federal question, Appellants still have a constitutional right to be heard in state court proceedings. This opportunity they have never had, and surely the denial of that right presents a substantial federal question.

To declare that this record fails to present a substantial federal question is (a) to overlook the obviously serious question of procedural due process presented by the record; (b) to acquiesce in an extraordinary limitation on the rights of litigants in state courts; and finally (c) to cast a shadow upon the sound and salutary principles of *Saunders* v. *Shaw*.

## CONCLUSION

It is respectfully submitted that the decision entered in this case should be clarified in the light of *Saunders* v. *Shaw*, 244 U.S. 317. For the reasons stated herein, Appellants pray that a rehearing be granted, and either that the question of jurisdiction be postponed until argument on the merits, or that probable jurisdiction be noted at least on the issue of procedural due process.

Respectfully submitted,

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### Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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